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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FRANCISCO GALVAN, Plaintiff and Appellant, v. JACK IN THE BOX, INC., Defendant and Respondent.	B290815 (Los Angeles County Super. Ct. No. BC622868)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Affirmed.

Law Offices of Jonathan D. Winters and Jonathan D. Winters for Plaintiff and Appellant.

Tyson & Mendes, Robert F. Tyson, Jr., Kristi Blackwell, and Terra M. Davenport for Defendant and Respondent.

Plaintiff Francisco Galvan sued defendant Jack in the Box, Inc. after plaintiff was beaten by an unknown assailant in the restroom in the restaurant. Plaintiff claimed defendant was on notice that patrons used drugs in the restroom, and failed to "stop these individuals or to place additional security to prevent a known and anticipated dangerous condition . . . ." Plaintiff also alleged he is disabled and legally blind, and defendant refused to serve him after the incident because of his disability.

Defendant successfully demurred to plaintiff's claims in his second amended complaint for premises liability, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence, and also successfully moved to strike plaintiff's claim for punitive damages. Defendant obtained summary judgment of plaintiff's remaining claims for violation of the Americans with Disabilities Act of 1990 (ADA; 42 U.S.C. § 12181 et seq.), and disability discrimination and failure to accommodate under California law (Civ. Code, §§ 51, 54, 54.1), which were asserted in his third amended complaint.

Plaintiff appeals from the resulting judgment, arguing the court erroneously sustained defendant's demurrer. He also contends his request for punitive damages should not have been stricken. Lastly, he contends defendant did not meet its burden of proof in moving for summary judgment, and that triable issues of fact exist.

We affirm the judgment.

BACKGROUND

1. The Allegations Common to the Second and Third Amended Complaint

Plaintiff was 57 years old, permanently disabled and legally blind from a 1979 shooting. He suffers from severe visual

and language impairments, and requires the use of a cane and walker to engage in daily activities.

Plaintiff was a regular customer of defendant's restaurant for over 15 years. On several occasions, plaintiff found used syringes, empty balloons, and other drug paraphernalia in the men's restroom. He would wrap up these items and give them to the restaurant's managers to dispose of them.

On June 14, 2014, while plaintiff was in the restroom, he was attacked by an "unknown individual" who punched him in the head, pushed him, and called him derogatory names. During the assault, one of defendant's team leaders heard the scuffle and opened the door. "When the unknown individual saw this employee . . . , [he] immediately ran out and fled from the Defendant's premises." The employee asked plaintiff if he was okay, and a witness called police, who responded to the scene and summoned the fire department. The fire department called an ambulance, and plaintiff was taken to the hospital and treated for his injuries.

Between October 2014 and January 2015, defendant refused to serve plaintiff. Defendant's employees told plaintiff the restaurant "is privately owned, and we have the right to refuse service to you."

2. The Court Sustained the Demurrer to Some Causes of Action in the Second Amended Complaint

The court sustained the demurrer without leave to amend to the premises liability, intentional infliction of emotional distress, and negligence causes of action in the second amended complaint. All those claims rested on the same allegations that "defendant . . . failed to inspect, act, guard against, provide security, or otherwise take affirmative action to protect patrons

such as the Plaintiff, from third persons, who come onto the Defendant's property and attack patrons on their business premises, including the Plaintiff herein." Plaintiff alleged that "defendant and its employees, were aware or should have been aware of the dangerous conditions which existed on the Defendant's premises and which posed a threat and harm to the safety of its business patrons . . . ."

3. Motion to Strike

Following the demurrer ruling, plaintiff filed a third amended complaint restating his causes of action for violation of the ADA, and violation of Civil Code sections 51, 54 and 54.1. He included a prayer for punitive damages.

The trial court granted defendant's motion to strike the prayer for punitive damages on the ground they are not recoverable for plaintiff's statutory discrimination claims.

4. Summary Judgment

Plaintiff's third amended complaint alleged he was denied service after the incident of June 14, 2014 "based on his disabilities." Plaintiff also alleged the "dangerous condition[]" of defendant's property denied him access.

Defendant moved for summary judgment of the disability claims, arguing plaintiff could not prove he was refused service because of his disability. Plaintiff had testified in his deposition that he was refused service because of telephone surveys he submitted to defendant to get free tacos.

Plaintiff testified he regularly completed surveys after his visits to the restaurant to receive free tacos. Defendant's employees refused service to plaintiff because plaintiff "didn't like their food," based on his survey responses. When asked if this was "the only reason why you think they refused service to you, is

because of the survey," defendant responded "[b]ecause of the survey, because when I put forth the survey." When asked whether discrimination motivated defendant's refusal to serve him, he admitted "it had more to do with just over the survey."

Defendant moved for summary judgment of the disability accommodation claims, arguing the claims failed as a matter of law because denial of service, as opposed to denial of physical access, cannot support a cause of action, and there was no evidence plaintiff was denied access to the restaurant.

Plaintiff opposed defendant's motion, arguing the drug activity in defendant's restroom, and defendant's failure to "rectify the dangerous condition on its premises" denied disabled patrons safe and reasonable accommodations available to other, non-disabled patrons.

Plaintiff provided his own deposition excerpts, where he testified in response to leading questions from his own attorney. After defendant's counsel elicited plaintiff's admissions that he was refused service because of the surveys, plaintiff's counsel asked him "is it your testimony that Jack-In-The Box and/or their employees denied, aided or incited a denial of or discriminated or made a distinction that denied you the full and equal accommodations, advantages, facilities or services of their establishment to you?" to which plaintiff replied "[a]bsolutely." Plaintiff's lawyer then asked, "[i]s it your testimony that a motivating reason for Jack-In-The-Box's conduct or their employee's conduct was their perception of your race, ancestry, national origin or disability?" to which plaintiff responded, "[y]es." His lawyer did not ask plaintiff to explain any facts that supported his opinion, and plaintiff did not testify to any facts in support of this opinion. Further, upon redirect examination by

defendant's counsel, plaintiff repeated his previous admissions that defendant's refusal of service "had more to do with just over the survey."

Plaintiff also provided a declaration testifying to his 15-year history of frequenting the restaurant, the June 14, 2014 assault, and his prior discovery of drug paraphernalia in the restroom. He testified, "Defendant never responded to my complaints and requests to stop these dangerous individuals or to place additional security to prevent the known and anticipated dangerous condition." "After the [June 14] incident, defendant banned me from its premises, refusing to serve me in October 2014, November 2014, December 2014 and January 2015. [¶] . . . I believe the motivating reason for [defendant's] conduct, its failure to respond to my complaints, its failure to stop the dangerous individuals, and its failure to place additional security was their perception of my race, ancestry, national origin and disability."

Defendant objected to most of the testimony in plaintiff's declaration. As is relevant here, defendant objected to plaintiff's testimony that defendant's conduct was based on his disability as speculative, and as having been contradicted by his deposition testimony.

The trial court sustained these objections to plaintiff's opinion that he had been discriminated against, declined to rule on the other objections as immaterial to the resolution of the motion, and granted defendant's motion for summary judgment. The court concluded there was no evidence that plaintiff was refused service based on his disability. The court also concluded plaintiff was not denied access to defendant's premises, reasoning

the attack by an unknown assailant was not foreseeable and could have happened to anyone, regardless of disability.

The trial court entered judgment in favor of defendant. Plaintiff filed a motion for a new trial that was denied.

Plaintiff filed a timely notice of appeal.[1]

DISCUSSION

1. Demurrer

A demurrer tests the legal sufficiency of the complaint. We review the complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by

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[1] Defendant contends we should not reach the merits of plaintiff's appeal from the order striking his claim for punitive damages, and the demurrer ruling, reasoning that plaintiff did not identify these grounds for appeal in his Civil Case Information Statement filed with this court (although they were identified by date in the notice of appeal), and his failure to attach the orders relating to these issues to his Civil Case Information Statement. It is well settled that interlocutory rulings may be reviewed upon an appeal from the final judgment. (Code Civ. Proc., § 904.1, subd. (a)(1); *Currier v. County of San Diego* (1963) 216 Cal.App.2d 595, 596.) Moreover, a Civil Case Information Statement need only attach the order from which the appeal is taken "that shows the date it was entered" so that the timeliness of the appeal may be determined. (See Cal. Rules of Court, rule 8.100(g)(1).) We will therefore reach the merits of these claims on appeal.

amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Ibid.*)

"The plaintiff bears the burden of proving there is a reasonable possibility of amendment. . . . [¶] To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' . . . The plaintiff must clearly and specifically set forth the 'applicable substantive law' . . . and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. . . . Allegations must be factual and specific, not vague or conclusionary. . . . [¶] The burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. . . . Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. . . ." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44, citations omitted.)

Courts require the plaintiff to state in the opening brief exactly what new or different facts can be alleged to cure the defective pleading. "A party may propose amendments on appeal where a demurrer has been sustained, in order to show that the trial court abused its discretion in denying leave to amend. [Citation.] However, the vague claim that 'concerns' could be 'address[ed]' by an amendment or there may be a type of relief

'that will not conflict with the [ground relied upon by the court in sustaining the demurrer]' does not satisfy an appellant's duty to spell out in his brief the specific proposed amendments on appeal." (*People ex rel. Brown v. Powerex Corp*. (2007) 153 Cal.App.4th 93, 112.)

"[T]here is nothing in the general rule of liberal allowance of pleading amendment which 'requires an appellate court to hold that the trial judge has abused his discretion if on appeal the plaintiffs can suggest no legal theory or state of facts which they wish to add by way of amendment.' [Citation.]" (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1387-1388.)

a. Premises liability

Where, as here, a plaintiff seeks to recover damages for injuries on the defendant's premises caused by a "criminal assault of unknown assailants . . . the plaintiff must show that the defendant owed . . . a legal duty of care, the defendant breached that duty, *and the breach was a proximate or legal cause of [the] injury*." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 772 (*Saelzler*), citing *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188 (*Sharon P.*) and *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673 (*Ann M.*).)[2]

A landlord's general duty to maintain premises in a reasonably safe condition includes "the duty to take reasonable steps to secure common areas against foreseeable criminal acts of

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[2] *Sharon P.* and *Ann M.* were disapproved on another point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, footnote 5. *Sharon P.* was also disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, footnote 19 (*Aguilar*).

third parties that are likely to occur in the absence of such precautionary measures." (*Ann M.*, *supra*, 6 Cal.4th at p. 674.) The scope of the duty "is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed. [Citation.] ' "[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." [Citation.]' [Citation.] Or, as one appellate court has accurately explained, duty in such circumstances is determined by a balancing of 'foreseeability' of the criminal acts against the 'burdensomeness, vagueness, and efficacy' of the proposed security measures." (*Id.* at pp. 678-679.)

In *Ann M.*, the court concluded "a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards," and "the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (*Ann M., supra,* 6 Cal.4th at p. 679.) The court then noted that "[i]t is possible that some other circumstances such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises could provide the requisite degree of foreseeability." (*Id.* at p. 679, fn. 7.)

A plaintiff must also show causation. "We did not intend to suggest in [another case] that a general finding of the foreseeability of some kind of future injury or assault on the premises inevitably establishes that the defendant's omission caused plaintiff's own injuries. Actual causation is an entirely

separate and independent element of the tort of negligence." (*Saelzler*, *supra*, 25 Cal.4th at p. 778.) "[T]o demonstrate actual or legal causation, the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury. [Citations.] In other words, plaintiff must show some substantial link or nexus between omission and injury." (*Ibid.*)

Here, plaintiff has failed to allege facts supporting duty or causation. Plaintiff has not alleged that violent assaults previously occurred at the restaurant or in neighboring businesses, and the allegation of drug use in the restroom is completely untethered to the assault upon plaintiff. There is no allegation that the unknown assailant was using, under the influence of, or selling drugs. Quite simply, there are no facts whatsoever indicating that the assault upon plaintiff was foreseeable on account of plaintiff's previous discovery of drug paraphernalia in the restroom or any other facts alleged.

Also, the complaint stated no facts that defendant's failure to hire a security guard was a substantial factor in causing his injury. To the contrary, the complaint alleged that defendant's employee heard the scuffle and opened the restroom door, which caused the assailant *immediately to flee*. Therefore, plaintiff has failed to allege that any act or omission by defendant was a substantial factor in causing his injury.

b. Remaining claims

Claims for intentional and negligent infliction of emotional distress, and ordinary negligence, all require that the defendant's conduct caused plaintiff's injury. (See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1259 [intentional infliction of emotional distress]; *Huggins v. Longs Drug Stores California, Inc.* (1993)

6 Cal.4th 124, 129 [negligent infliction of emotional distress]; *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318 [negligence].)

As discussed *ante*, plaintiff has not alleged any facts showing defendant's conduct caused his injury. Plaintiff contends these claims arose not only from the June 14 assault, but from the discriminatory exclusion of plaintiff from defendant's business. We are not persuaded. A close examination of plaintiff's second amended complaint reveals these claims were based solely on the attack. Even though each cause of action "incorporate[d] . . . by reference" the earlier allegations in the complaint, it is clear from the pleading that plaintiff did not intend to base these causes of action on the denial of service, as he explicitly recounted the details of the assault in each of these causes of action, but omitted any facts related to the denial of service. Therefore, the trial court properly sustained the demurrer to these claims.

c. Leave to amend

The trial court granted plaintiff leave to amend three times. Plaintiff has not proposed on appeal any additional facts which could be added to state a cause of action. He has not met his burden on appeal to demonstrate an abuse of discretion. (To the extent plaintiff argues his allegations regarding refusal of service provide a basis for these claims, our determination, *post*, that plaintiff cannot establish discrimination necessarily demonstrates those allegations cannot cure the defects in his claims.)

2. Motion for Summary Judgment

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be

established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.,* subd. (c).)

Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar*, *supra*, 25 Cal.4th at p. 854.) It is no longer called a "disfavored" remedy. (*Perry,* at p. 542.) "Summary judgment is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Ibid.*) On appeal, "we take the facts from the record that was before the trial court . . . . ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037, citations omitted.)

It is unlawful under state and federal law to deny public accommodations on the basis of disability. (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1126-1127 [discussing ADA, and Civ. Code, §§ 51, 54-55.3].) Here, defendant offered plaintiff's own deposition testimony that he was excluded from defendant's restaurant because of his negative survey responses, and not because of his disability. Defendant met its burden to establish it was entitled to judgment as a matter of law.

Plaintiff contends his deposition responses and declaration establish that triable issues of fact exist (and that defendant

wrongfully omitted these deposition answers in its motion), as he testified to his *belief* that defendant's conduct was based on his disability. However, plaintiff's testimony provided absolutely no factual basis for his belief. As such, it was insufficient to create a triable issue of fact, and defendant's objection to this evidence was properly sustained. (*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1404 [parties opposing summary judgment cannot rely upon "assertions that are 'conclusionary, argumentative or based on conjecture and speculation' "].) Moreover, plaintiff's declaration was completely at odds with his deposition testimony that he was excluded from the restaurant because of his survey responses. A party may not create a material disputed fact with testimony that contradicts previous discovery responses. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21; see also *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087.)

To the extent that plaintiff contends the failure to prevent drug use in the restroom denied him access or failed to accommodate him, there was no evidence this condition had any effect whatsoever on disability access. (*Hankins v. El Torito Rests.* (1998) 63 Cal.App.4th 510, 521-522.) Accepting as true that defendant did nothing to prevent people using drugs in the restroom, defendant's conduct impacted all patrons alike, regardless of disability.

Because we conclude that judgment was properly entered in defendant's favor, we need not reach plaintiff's claim that the court erroneously granted defendant's motion to strike his prayer for punitive damages.

DISPOSITION

The judgment is affirmed. Defendant is to recover its costs on appeal.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.